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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,
v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,
v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

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REPLY BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

To date, the central issue in this litigation has been whether petitioner Comptroller of the Currency ("Comptroller") acted lawfully in approving the establishment of national bank discount brokerage offices on an interstate basis, ruling that such offices are not branch banks under the McFadden Act, 12 U.S.C. § 36(f) (1982) (defining "branches" to be facilities "at which deposits are received, or checks paid, or money lent"), and that they thus are not subject to Section 36's provisions effectively limiting branches to a bank's home state. Now, in the

wake of petitioners' briefing on this issue, respondent Securities Industry Association ("SIA") shifts position, contending instead that regardless of whether the discount brokerage offices are branches, they violate another portion of the Act, 12 U.S.C. § 81, which SIA contends prohibits a national bank from conducting any business away from its main office or branches. This belated assault on the Comptroller's approval of petitioner Security Pacific National Bank's ("Security Pacific") discount brokerage offices is meritless.

I. THE COMPTROLLER CORRECTLY RULED THAT INTERSTATE DISCOUNT BROKERAGE OFFICES DO NOT VIOLATE THE McFADDEN ACT.

A. SIA's Unprecedented Reading Of Section 81 Is Indefensible.

SIA argues that because of Section 81, a national bank must "conduct [all of its] business only at [its] headquarters and at permitted branches." (SIA Br. at 18; *see also id.* at 14-15.) Thus, SIA promotes an unthinking analysis of whether a national bank may lawfully conduct a certain activity at a particular location. According to SIA, if an activity is conducted at a location other than the bank's main office or an authorized branch, it is improper. This position disregards the numerous prior judicial examinations of the McFadden Act, to say nothing of the Act's fundamental purpose and legislative history.

In previous McFadden Act challenges, it has always been conceded that the site of the challenged activity was neither the main office nor an authorized branch. Under SIA's reading of Section 81, the analysis should have ended there since any national bank activity conducted at a location other than a main office or authorized branch would be unlawful *per se*. Yet, in every prior case, the federal court perceived the dispositive issue to be whether the activities conducted at the challenged national bank facility were among the banking

functions enumerated in Section 36(f) (*i.e.*, receiving deposits, paying checks, or making loans), thereby making the facility a branch subject to the Act's locational restrictions. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) (question whether national bank could lawfully operate an armored car and a drop box turned on whether such facilities received deposits and therefore constituted branches). The underlying assumption was that if the national bank facility was not a branch under the McFadden Act, it could appropriately be located "anywhere (even across state lines)." *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 924 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).[1]

In making an argument inconsistent with these precedents, SIA errs by reading Section 81 in complete isolation, pretending that Section 36 does not exist. Indeed, if SIA is correct that Congress intended Section 81 to restrict all of a national bank's business to its main office or branches, there would have been no reason for defining "branch" in Section 36, since under SIA's view, every national bank office that is not a main office would have to be a branch.

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[1] *See also Jackson v. First Nat'l Bank of Gainesville*, 430 F.2d 1200 (5th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971) (same analysis as to armored car service); *St. Louis County Nat'l Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (similar analysis as to suburban trust offices); *Colorado ex rel. State Banking Board v. First Nat'l Bank of Fort Collins*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (similar analysis as to customer-bank communication terminals). In each of these cases, the analysis of whether the national bank operations at issue complied with the McFadden Act concentrated on Section 36 without attributing distinct significance to Section 81. SIA's erroneous allegation that the Comptroller gave inadequate consideration to Section 81 (SIA Br. at 23-25) is thus hardly a basis for denying deference to the Comptroller's ruling. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). (*See also* Sec. Pac. Br. at 19-32.)

Sections 36 and 81 (which were Sections 7 and 8, respectively, of the McFadden Act) are symbiotic provisions that must be read in tandem to give effect to their common purpose: to ensure a competitive balance between federal banks and state banks as to branch banking. (*See* Sec. Pac. Br. at 21.) According to the conference report on the McFadden Act, Section 81 merely establishes the permissive proposition that national banks "might transact" their banking activities "not only at the place specified in the organization certificate but also at . . . branches," and Section 36 in turn specifies those national bank facilities which, because of the activities they perform, are to be deemed "branches" subject to the locational limitations specified in that section. H.R. Rep. No. 1481, 69th Cong., 1st Sess. 4-5 (1926). *See also* S. Rep. No. 473, 69th Cong., 1st Sess. 8 (1926) (noting that Sections 81 and 36 together "deal with the all-important subject of branch banking"); H.R. Rep. No. 83, 69th Cong., 1st Sess. 4 (1926) (noting that Section 81 "recognizes the right of national banks to establish branches" in certain circumstances); 67 Cong. Rec. 3238 (1926) (statement of Rep. Black) (noting that Section 81 "is a permissive statute"). Although they erred in other respects, the lower courts herein at least recognized (like prior courts) that Sections 81 and 36 are to be construed together as creating "*branching* restrictions," *see* 577 F. Supp. at 260 (20a) (emphasis added), and that a court must first determine whether a national bank facility constitutes a branch bank (as defined by Section 36(f)) before deciding whether it is subject to the Act's "branching restrictions." *Id.*[2]

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[2] The lower courts erred not in their framing of the issue presented, but rather in their application of an overbroad, untenable branch definition. (*See* Sec. Pac. Br. at 32-34.) The Comptroller has argued that this definition "would disrupt long settled practice in the banking industry." (Comp. Br. at 36.) The adoption of SIA's view of Section 81 would not only disrupt current practice but

Even if Section 81 could be read in isolation from Section 36, it would not yield the result advocated by SIA. Section 81 states:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

Contrary to SIA's argument (SIA Br. at 12, 14-15, 18), the "plain meaning" of the word "general" as used in Section 81 is hardly "all-encompassing," requiring that *all* business of a national bank be carried on at the "place specified in its organization certificate" or at authorized branches. If anything, Congress used "general" for a limiting purpose, intending to exclude some specific types of business.[3] Had Congress meant the provision to be "all-encompassing," it would have omitted the word "general" (to speak in terms of "*the* business of each national banking association") or simply used the word "all."[4]

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would also reverse the numerous banking law precedents noted previously. *See supra* at 2-3 & n.1.

[3] Another indication of a less than "all-encompassing" intent is Section 81's statement that "general business" may be carried on at "the place specified in [a national bank's] organization certificate." In 12 U.S.C. § 22 (1982), the "place specified in [the] organizational certificate" is defined as "[t]he place where [a national bank's] operations of discount and deposit are to be carried on," considerably less than the full range of authorized national bank functions.

[4] SIA relies heavily on its observation that Rev. Stat. 5190 stated that "[t]he *usual* business of [a] national banking association shall be transacted . . . in the place specified in its organization certificate" (emphasis added) and that the McFadden Act substitute the current Section 81 for that statute by, *inter alia*, inserting the phrase "general business" for "usual business." (*See* SIA Br. at 12-15.) SIA asserts that the inclusion of "general business" was specifically intended to prohibit a national bank from conducting any business away from its main office or authorized branches. Prior to passage of the McFadden Act, however, a na-

The McFadden Act's legislative history confirms that SIA is plainly wrong in asserting that Section 81 was intended to impose locational limitations on "*at least* those activities Congress has expressly sanctioned for [national] banks." (SIA Br. at 15 (emphasis in original).) Section 2(b) of the Act contained "two provisos, each of which recognize[d] and affirm[ed] the existence of a type of business which national banks [were then] conducting" in addition to the business of banking. S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926). The first proviso explicitly confirmed national bank authorization to engage in brokerage activities (of the type at issue herein) (*see* Sec. Pac. Br. at 22-25), and the other similarly affirmed national bank involvement in the "safe-deposit business." S. Rep. No. 473, at 7; H.R. Rep. No. 83, at 4. Section 2(b) of the bill Congress originally considered contained a phrase that would have expressly limited a national bank's authority "to conduct a safe deposit business" to activities "located on or adjacent to the premises of such association." 67 Cong. Rec. 3231 (1926). During final

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tional bank clearly was not required to conduct all of its business at its main office. (*See* Sec. Pac. Br. at 25 n.20.) For example, in one opinion, the Attorney General observed that as used in Rev. Stat. 5190,

> "usual business" . . . is to be construed [as] the general banking business usually conducted by national banks. There is no statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the [bank] . . . . [The bank] may not, however, establish a branch bank to do a general banking business such as is usually done by national banks.

34 Op. Att'y Gen. 1, 3-4 (1923). If the McFadden Act was intended to reverse the long-standing policy reflected in the Attorney General's opinion, one would expect at least some explicit mention of this purpose in the legislative history. Yet, no legislative history has come to light that would contradict the view that the phrase "general business" is simply another way of saying "usual business" and does not embrace "all the business of a national bank."

floor debates, however, the House deleted these locational restrictions. *Id.* at 3231-32. Upon introduction of the deleting amendment, Rep. Celler asked: "Does that mean that a safe-deposit business can be conducted a block away or a mile away from a national banking association?" *Id.* at 3232. Rep. McFadden responded in the affirmative, noting that the amendment "removes the limitations" on location. *Id.* Congress thus clearly did not intend any supposed locational restrictions in Section 81 to apply to the "expressly sanctioned" safe-deposit business.

Even more telling, before enactment, the bill never included any locational limitations with respect to the brokerage provisions in the same subsection. Congress knew that national bank brokerage activities were being conducted on a nationwide basis. (*See* Sec. Pac. Br. at 24-25; *see also infra* at 8.) Hence, the failure even to propose locational limitations on brokerage when such limits were proposed for the safe-deposit business is a strong signal that Congress had no desire to confine national bank brokerage to particular sites or to change the existing law and practice of allowing that business to be conducted nationwide. Moreover, it indicates that Section 81 does not provide any basis for nullifying the Comptroller's approval of interstate discount brokerage offices.

B. Section 36 Does Not Restrict Discount Brokerage Activities.

SIA alternatively contends that the Comptroller's ruling should be reversed because he erred in holding that interstate discount brokerage offices are not branches and that they therefore are not subject to the locational limitations of Section 36. (SIA Br. at 18-23.) In so arguing, SIA studiously avoids the plain language of Section 36, which defines "branch" to encompass only facilities carrying on enumerated banking functions concededly not performed by discount brokerage offices, and which alone provides sufficient basis for affirming the Comptroller's

ruling. (*See* Sec. Pac. Br. at 15-19 (citing *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 689 (1986)).) Even if reference to interpretative guidance beyond the terms of Section 36 is necessary, the Comptroller's construction of the statute is entirely reasonable and should be upheld, particularly given the strong support provided by the McFadden Act's legislative history. (*See* Sec. Pac. Br. at 20-27.)

In its opening brief, Security Pacific noted that the Act addressed not only branching issues, but also "affirmed" the "business of buying and selling investment securities" which "national banks are now conducting." [5] S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926). (*See* Sec. Pac. Br. at 24.) Since Congress was obviously aware of the theretofore interstate nature of those national bank brokerage activities, this legislative history shows an unambiguous congressional intent to "affirm" (not prohibit) the conduct of national bank brokerage activities through interstate offices.[6] (*See* Sec. Pac. Br. at 24-25.)

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[5] By the time the McFadden Act was passed, national banks had been providing brokerage services for almost twenty years, some banks doing so on an interstate basis. For example, when the Act became law, the security affiliate of National City Bank had at least 29 offices outside its home state of New York. *See* W. Peach, *The Security Affiliates of National Banks* 89 n.42 (1941). The first such affiliate was established in 1908 by the First National Bank of New York. *Operation of the National and Federal Reserve Banking Systems: Hearings Pursuant to S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1052 (1931) (*"1931 Senate Hearings"*). As early as 1913, the Pujo Report to Congress on the financial industry reported on the activities of national bank security affiliates. H.R. Rep. No. 1593, 62d Cong., 3d Sess. 55-106 (1913); W. Peach, at 148.

[6] As discussed above, such congressional intent is also indicated by Congress' omission of any locational limitations on brokerage activity in Section 2(b) of the McFadden Act, even though prior to enactment, such limitations were for a time included in the legislation as to the safe-deposit business, the other national bank activity authorized by Section 2(b) of the Act. *See supra* at 6-7.

Then in 1933, after such interstate offices had become even more numerous, Congress enacted the Glass-Steagall Act to regulate national bank securities activities. Therein, however, Congress made no effort to limit the location of national bank brokerage offices, and it thereby ratified the very interpretation of the McFadden Act the Comptroller rendered in this case: brokerage offices are not subject to the Act's branching restrictions. (*See* Sec. Pac. Br. at 25-27).[7]

SIA asks the Court to declare this history "immaterial to the issue here," claiming that these brokerage activities were engaged in by affiliates not directly owned by the national banks and were therefore "not [activities] conducted by the banks themselves." (SIA Br. at 16-17.) However, SIA's argument that no security affiliates were directly owned by national banks is incorrect. *Operation of the National and Federal Reserve Banking Systems: Hearings on S. 4115 Before the Senate Comm. on Banking and Currency*, 72d Cong., 1st Sess. 392 (1932) ("*1932 Senate Hearings*") (statement of Eugene Meyer, Governor, Federal Reserve Board) (noting that at least some security affiliates were directly owned by national banks); W. Peach, *The Security Affiliates of National Banks* 68 (1941).[8] To the extent that the national bank security affiliates of that era were not directly owned, they operated in a manner virtually identical to the modern-day wholly-owned subsidiary, the form of ownership approved by the Comptroller in this

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[7] During the early 1930's, Congress held annual hearings which in part considered national bank brokerage activities. *See, e.g., 1931 Senate Hearings, supra.* Through those hearings, Congress was informed of the nationwide scope of these activities. Yet, no concern was expressed that by establishing out-of-state offices, national banks were violating the branching provisions of the McFadden Act, enacted only a few years earlier.

[8] Although national bank ownership of stock in other corporations was restricted, national banks may have directly owned the stock of their affiliates as a result of the Edge Act, *see* W. Peach, at 68-70, or as a result of conversion from a state to a national charter. *Id.* at 70.

case. (*See* Sec. Pac. Br. at 5-6.) Such affiliates were structured to ensure that their shareholders were always identical to those of the national bank by which they were established.[9] *1931 Senate Hearings*, at 1056. *See also id.* at 192 (statement of Albert H. Wiggin, Chairman of Chase National Bank). And as Congress noted, "it goes without saying that, through identity of stock ownership, there is identity of real control." *Id.* at 1057. In any event, the legislative history relied upon by Security Pacific is highly relevant because contrary to SIA's revisionist characterizations, Congress certainly believed that brokerage activities were being "conducted by the banks" and that the security affiliates were anything but unrelated or "immaterial." (Quoting SIA Br. at 16-17.) Indeed, in enacting the McFadden Act provisions ratifying the securities activities being conducted by national bank affiliates, Congress characterized those activities as a "business which *national banks* are now conducting."[10] S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926) (emphasis added).

The McFadden Act was intended to expand the locations at which national banks could engage in the "business of banking," 12 U.S.C. § 24 (Seventh) (Supp. III 1985);[11] that is, the locations at which banks could per-

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[9] Identity of stock ownership in national banks and their affiliates usually was achieved in one of three ways. First, the stock of the affiliate could be trusteed for the benefit of the shareholders of the bank. *1931 Senate Hearings*, at 1056; W. Peach, at 66. Second, each share of stock in the affiliate could be physically affixed to the share certificates of the bank, with provisions prohibiting the transfer of one interest without the other. *1931 Senate Hearings*, at 1056; W. Peach, at 67. Third, the shares of the affiliate could be owned by another affiliate, with the same restrictions on transferability. W. Peach, at 67-68.

[10] Similarly, the Glass-Steagall Act's subsequent regulation in the area in 1933 was addressed directly to national banks and not simply to their affiliates. (*See* Sec. Pac. Br. at 26-27.)

[11] *See also 1931 Senate Hearings*, at 404 (statement of Melvin W. Traylor, Chairman, First National Bank of Chicago) (noting

form the functions enumerated in Section 36(f) (*i.e.*, receiving deposits, paying checks, lending money). But Congress never intended Section 81, Section 36, or any other provision of the Act to affect the locations, already widespread, at which national banks were conducting what Congress perceived as the distinct "business of buying and selling investment securities." Ch. 191, § 2(b), 44 Stat. 1226 (1927).[12]

II. SIA LACKS STANDING TO MAINTAIN THIS ACTION.

SIA asks the Court merely to wink at the "zone-of-interests" standing prerequisite in this instance, arguing that because SIA's members will face increased competition if national banks offer discount brokerage services nationwide, any issue as to SIA's standing "should be all but obviated." (SIA Br. at 26.) If the "zone-of-interests" prerequisite has any viability, this request cannot be obliged.

According to SIA, since this Court has held that non-bank entities have standing in other banking law cases, standing must exist here. (*See* SIA Br. at 28 (warning against "revers[ing] the rationale" of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S.

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that brokerage was not part of "the purely banking business, where you accept deposits and make loans").

[12] Amicus curiae IBAA urges another interpretation of the branch definition in Section 36(f), contending that the McFadden Act was intended to promote "competitive equality" between state and national banks in all respects. (*See* IBAA Br. at 8-12.) IBAA argues that *any* activity that would give national banks a "competitive advantage" over state banks may be performed only at the bank's main office or branches. (IBAA Br. at 20.) But the McFadden Act was enacted solely to ensure the " 'competitive equality' " of national banks and state banks "insofar as *branch banking* was concerned." *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (emphasis added). Section 36 thus addresses only certain enumerated banking functions Congress deemed to constitute branch banking, none of which is performed by the challenged discount brokerage offices. (*See* Sec. Pac. Br. at 15-17.)

150 (1970), *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curiam), and *Investment Company Institute v. Camp*, 401 U.S. 617 (1971)).) The cases cited by SIA, however, involved distinct banking laws enacted for different purposes.[13] In *Data Processing*, for example, the Court noted that the statute at issue broadly regulated certain competition between national banks and all non-bank entities. 397 U.S. at 155-56. In contrast, the purpose of the McFadden Act's branching provisions, as embodied in *both* Section 36 *and* Section 81, *see supra* at 3-4, was solely to ensure the competitive equality of national banks and state banks with respect to branch banking, *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966), not to regulate competition between banks and non-bank entities like SIA's members.[14] It is thus hardly "incongruous" (SIA Br. at 29) that while SIA might have standing to enforce substantive provisions of other banking laws, it lacks standing under the branching provisions of the McFadden Act.[15]

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[13] SIA's suggestion that those cases and the instant matter all arose under the same legislation—the "National Bank Act"—is misleading. (SIA Br. at 28.) While this case arose under the McFadden Act, *Data Processing* and *Arnold Tours* involved standing under Section 4 of the Bank Service Corporation Act of 1962, Pub. L. No. 87-856, 76 Stat. 1132, and *Investment Co. Institute* concerned Section 16 of the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933).

[14] The McFadden Act's branching provisions were not intended to be broad restrictions on "the scope of national banks' activities." (SIA Br. at 29.) The fundamental approach of the Act's branching provisions—to delegate authority to the states to determine the location of national bank branches—would have been a curious and highly indirect method of broadly curbing national bank activity.

[15] In invoking a statute intended to protect all competitors, it may not be necessary for a competitor-plaintiff "to 'rely on' . . . legislative history showing that Congress [specifically] desired to protect' " him. (SIA Br. at 27 (quoting *Arnold Tours*, 400 U.S. at 46).) But by the same token, legislative history clearly indicating that a statute's zone of interests is to include only national and state

CONCLUSION

For all of the foregoing reasons, as well as those stated in its opening brief, petitioner respectfully submits that the decision of the court of appeals should be reversed.

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banks cannot be ignored by allowing non-banks to avail themselves of the statute's protections merely because they suffer an alleged injury.